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89 No. 1978

Supreme Court, U.S.
FILED
JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KERRY McQUEEN, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED FOR REVIEW

IF THE STATE DISCRIMINATORILY TAKES FIFTH AMENDMENT PRIVATE "PROPERTY" AND LIBERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION OR A FORMAL HEARING AND THEREBY VIOLATES THE JUST COMPENSATION CLAUSE, SUBSTANTIVE DUE PROCESS CLAUSE, PROCEDURAL DUE PROCESS CLAUSE, EQUAL PROTECTION CLAUSE, THIRTEENTH AMENDMENT, AND 42 U.S.C. SECTION 1994, IS THERE A PRIVATE RIGHT OF ACTION FOR DAMAGES AGAINST THE STATE TO VINDICATE PAST CONSTITUTIONAL RIGHTS OR ONLY A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF?

a. IS THE DAMAGE REMEDY ONLY AVAILABLE UNDER THE JUST COMPENSATION CLAUSE FOR TAKINGS OF REAL PROPERTY OR DO ALL TYPES OF FIFTH AMENDMENT "PROPERTY" RECEIVE THE SAME PROTECTION?

b. IS THE DAMAGE REMEDY AGAINST THE STATE FOR SUBSTANTIVE DUE PROCESS, PROCEDURAL DUE PROCESS, EQUAL PROTECTION, OR THE THIRTEENTH AMENDMENT PROVIDED BY A DIRECT CONSTITUTIONAL ACTION UNDER *BIVENS* OR *CAREY v. PIPHUS*?

c. DOES A CIVIL CAUSE OF ACTION FOR DAMAGES UNDER THE THIRTEENTH AMENDMENT OR SECTION 1994 STATE A CLAIM BASED ON THE THREAT OF LEGAL ACTION BY THE STATE, INCLUDING THE LOSS OF AN INDIVIDUAL'S LIVELIHOOD, BUT SHORT OF ACTUAL IMPRISONMENT?

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OPINIONS BELOW

The opinion of the District Court of Seward County, Kansas is unreported, but is set forth in Appendix 2.

The opinion of the Supreme Court of the State of Kansas is reported at 245 Kan. 749, 783 P.2d 343, and is set forth in Appendix 1.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Supreme Court of the State of Kansas, entered December 8, 1989, rehearing denied on March 14, 1990, is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitutional Provisions

amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

amend. XIII provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
>
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

amend. XIV provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Federal Statutes

42 U.S.C. Section 1994 provides:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions; orders; regulations; or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons or peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

STATEMENT OF THE CASE

This is a class action suit brought by rural Kansas lawyers seeking damages for past violations of their constitutional rights under a court appointment system that was held unconstitutional by the Kansas Supreme Court in *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987) ("*Smith*").

Kansas country lawyers ("Plaintiffs") have been court appointed to represent indigent criminal defendants for many years. Over the last few years, the burden on court appointed counsel has increased dramatically because of the combined effect of the increase in the number of criminal cases, the complexity of the criminal and constitutional law, and the cost of maintaining a law practice. *Smith*, 242 Kan. at 360-61, 368. Kansas court appointments have been made for the last 20 years under the Indigent Defense Services Act, and its more recent rules and regulations ("Act") promulgated by the State Board of Indigents' Defense Services. See Kan. Stat. Ann. Sec. 22-4501, *et seq.* and Kan. Admin. Regs. 105-1-1, *et seq.*

Not all Kansas attorneys were court appointed under the Act. Only about 35% of the Kansas bar were required to represent indigent criminal defendants. The other 65%, located mainly in large cities where public defenders were supplied, were not required to donate any of their time or money to indigent criminal defense. *Smith*, 242 Kan. at 375-76. Thus, the country lawyers and public defenders carried the burden of representing the indigent criminal defendants.

Under the Act, the State Board of Indigents' Defense Services ("State Board") set standards and guidelines for compensating court appointed attorneys. Without even considering the cost of providing legal services or the cost of a lawyer's overhead, the State Board adopted regulations allowing a maximum fee of $30.00 per hour, with a $250.00 cap in felony cases which did not go to trial, $1000.00 cap for cases that did go to trial, and $100.00 cap for representation of indigent grand jury witnesses, revocation of probation hearings, and motions

to modify sentences. *Id.* at 345-46, 364. But the average office overhead for court appointed lawyers was more than the $30.00 per hour maximum fee, which was often reduced further by the caps. *Id.* at 351. The payment of legal fees to court appointed lawyers was cut even more, approximately another 12% reduction in 1987, when the State legislature reduced the State Board's budget by 3.8% even though under the same budget the public defenders' salaries and paid overhead was not reduced. *Id.* at 376.

Presented with these facts, the Honorable James J. Smith, District Judge for Anderson County, entered an order that court appointed lawyers were entitled to be paid a reasonable fee of at least $68.00 per hour. *Id.* at 337-39. The Kansas Attorney General filed a Petition for Mandamus to require Judge Smith to make appointments of counsel to indigent criminal defendants as directed by the Act. *Id.* at 340. The Kansas Supreme Court in *Smith* unanimously declared the Act unconstitutional.

The *Smith* court held:

1. Although lawyers had an ethical obligation to provide *pro bono* services, the State had the legal duty to provide counsel for indigent criminal defendants, and the "State had an obligation to compensate attorneys appointed." *Id.* at 359-61.

2. The Act "on its face does not violate [substantive] due process . . . , [but] the application or administration- . . . could render it unreasonable and arbitrary." *Id.* at 363.

3. "Attorney's services are property . . . subject to Fifth Amendment protection", and since the Act did not

provide just compensation, "the system violates the Fifth Amendment." *Id.* at 370.

4. The Act violated the equal protection clause because (a) it treated lawyers differently from other professionals by requiring them to subsidize indigent criminal defense; and (b) it treated lawyers differently depending on their geographic location. *Id.* at 373-77.

5. The Act did not violate the Thirteenth Amendment because no Kansas attorney faced imprisonment for refusing a court appointment. *Id.* at 378.

6. The Act violated Kan. Const. art. 2, Sec. 17, of the Kansas Constitution because it did not operate uniformly throughout the State, rather country lawyers were court appointed and lawyers in large, urban counties were not. *Id.* 381-83.

Therefore, the *Smith* court struck down the Act, but required the country lawyers to continue representing indigent criminal defendants for another 6½ months while the State took legislative or administrative action to comply with the Constitution. *Id.* at 383.

With no State action being taken, Plaintiffs filed suit in federal court seeking injunctive relief and damages for violations of their constitutional rights. On July 1, 1988, the State adopted a new indigent defense services system which made representation voluntary and increased the hourly fee to $50.00 per hour with no caps or budget reductions. To fund this new system, the State Board's annual budget was increased by more than $2,000,000.00. This mooted Plaintiffs' suit for injunctive relief, and the remaining damage suit in federal court was dismissed on

Eleventh Amendment grounds. So on March 16, 1988, Plaintiffs filed a Class Action Petition in state district court. *See* Class Action Petition in Appendix 4.

Plaintiffs' Class Action Petition raised the following federal questions:

Counts I and II.	Due Process and Just Compensation/Taking Violations.
Count III.	Equal Protection Violation.
Count VI.	Thirteenth Amendment Violation.
Count IX.	Attorney's fees under statutory, common law, or constitutional doctrines such as inverse condemnation.
Count X.	Violation of 42 U.S.C. Section 1994.[1]

The State of Kansas moved to dismiss Plaintiffs' Petition on the pleadings for failure to state a cause of action. The State claimed it could not be a defendant in an implied cause of action under the Due Process Clause, Equal Protection Clause, or Thirteenth Amendment under the rationale of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs argued that *Bivens* actions had already been recognized under those constitutional provisions and that there was no reason for a State to be immune.

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[1] The state substantive causes of action raised in the Petition (Counts IV and V, unjust enrichment and Kansas Constitution Art. 2, Section 17) have been determined by the State's highest court, and are not before this Court for review. The 42 U.S.C. Section 1983 and 1985 claims (Counts VII and VIII) were precluded during the appeal by this Court's decision in *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304 (1989), and also are not being raised before this Court.

The State also argued that under the Takings/Just Compensation Clause Plaintiffs were only entitled to injunctive relief, not damages, because *Smith* had already provided all the relief that was available. Plaintiffs, however, argued that *Smith* was not a damage suit so the issue was never raised and that the State was subject to inverse condemnation actions and had to pay from the date of the taking.

The State also contended that the Thirteenth Amendment and 42 U.S.C. Section 1994 action failed because involuntary servitude was only actionable if it was backed by the threat of imprisonment, which was not alleged by Plaintiffs. Plaintiffs argued that the Thirteenth Amendment did not require the threat of imprisonment in a civil action, and that Section 1994 barred both voluntary and involuntary servitudes.

Lastly, Plaintiffs argued that if the State's Motion to Dismiss were granted, the State's past constitutional transgressions found in *Smith* would go without any remedy, and such a result would render Plaintiffs' constitutional rights meaningless.

Without mentioning any of the specific causes of action asserted, and only citing and briefly discussing *Smith*, the state trial court granted the State's Motion to Dismiss. *See* District Court Opinion in Appendix 2. Plaintiffs appealed to the state court of appeals, and due to the importance of the issues presented, the case was transferred to the Kansas Supreme Court.

The Kansas Supreme Court held that the Thirteenth Amendment cause of action was defective for failure to allege that Plaintiffs were threatened with imprisonment

if they did not serve as court appointed counsel. The Kansas Supreme Court did not discuss the distinction between 42 U.S.C. Section 1994 and the Thirteenth Amendment, but denied relief under Section 1994.

The Kansas Supreme Court on the Takings/Just Compensation Clause issue found that the theory of inverse condemnation was not presented to the trial court and that inverse condemnation actions did not apply to the taking of services, only to the taking of real property. The Kansas Supreme Court also found that *Bivens* actions could not be maintained against States. Finally, the court below concluded that even though the Act offended the Constitution, only equitable relief, not damages, was proper. *See* Opinion in Appendix 1.

Plaintiffs moved for a rehearing or modification of the decision, arguing:

1. The importance of the decision for the constitutional rights of all service providers warranted closer scrutiny.

2. Substantive and Procedural Due Process – the decision was contrary to the already recognized *Bivens* action and to *Carey v. Piphus*, 435 U.S. 247 (1978).

3. Thirteenth Amendment – the decision was contrary to the already recognized *Bivens* action and to *United States v. Kozminski*, 487 U.S. 2751 (1988), which did not equate "involuntary servitude" with the "threat of imprisonment".

4. Section 1994 – the decision never specifically addressed it, and it is more broad than the Thirteenth Amendment.

5. Just Compensation/Taking – the decision was contrary to the language and intent of *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), which required compensation for governmental taking of property, and inverse condemnation was adequately plead in the Petition, indeed the phrase "inverse condemnation" was used in the Petition itself, and the issue was briefed and argued by both sides on appeal.

6. Equal Protection – the decision was contrary to the already recognized *Bivens* action.

7. Violation of an individual's freedoms guaranteed by the Constitution required that a damage remedy be available to give meaning to the constitutional right.

The State argued the Kansas Supreme Court's decision was correct. Without further discussion, the Kansas Supreme Court denied Plaintiffs' Motion for Rehearing. *See* Appendix 3.

Plaintiffs timely petitioned this Court for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE KANSAS SUPREME COURT'S ERRONEOUS DECISION ALLOWS THE STATE TO TAKE PRIVATE PROPERTY FOR PUBLIC USE WITHOUT PAYING JUST COMPENSATION WHICH CONFLICTS WITH THIS COURT'S HOLDING AND RATIONALE IN *FIRST LUTHERAN CHURCH* AND DIMINISHES THE FIFTH AMENDMENT PROTECTION.

The State of Kansas under the Act took Fifth Amendment "property", in the form of money and services, from

Kansas country lawyers without just compensation. The "property" taken was worth over $2 million per year, as shown by the necessary budget increase to fund the new voluntary court appointment system. Plaintiffs alleged such money and services were Fifth Amendment "property", which for purposes of a Motion to Dismiss on the pleadings must be taken as true. *Keith v. Schiefen-Stockman Ins. Agency, Inc.*, 209 Kan. 537, 538, 498 P.2d 265 (1972). Besides, the Kansas Supreme Court has already held: "We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection." *State ex rel. Stephan v. Smith*, 242 Kan. 336, 370, 747 P.3d 816 (1987).

When Fifth Amendment property is taken, just compensation must be paid from the date of the taking. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). The Kansas Supreme Court in *Smith* invalidated the Act, albeit prospectively by over 6 months, but this Court rejected that as a cure-all: "Invalidation . . . is not a sufficient remedy to meet the demand of the Just Compensation Clause." *First Lutheran Church*, 482 U.S. at 319. Rather, the State has "the duty to provide compensation for the period during which the taking is effective." *Id.* at 321.

The Kansas Supreme Court's attempt to distinguish this case from *First Lutheran Church* is not legally justified or logically plausible. The Kansas Supreme Court held that *First Lutheran Church* did not apply to all Fifth Amendment property, only to "real property", so the State may take and keep without any compensation any other type of Fifth Amendment "property" (presumably even without a hearing as in this case). Not surprisingly,

the Kansas Supreme Court cites no constitutional, statutory, or common law authority, not even by analogy, for its unusual interpretation of the Fifth Amendment. Nor does the Kansas Supreme Court offer any reason why Fifth Amendment "property" should be categorized and treated differently. Quite simply, other than the wrongdoer's self-interest in not wanting to pay back its ill-gotten gains, there is no reason to support the Kansas Supreme Court's novel position.

The Fifth Amendment does not categorize types of "property". Nor does it provide some types of takings can be done without making just compensation. Nothing in *First Lutheran Church* states or even implies that Fifth Amendment property is to be dissected into various categories and treated differently. Indeed, the rationale of the Fifth Amendment dictates otherwise.

> The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* L. Tribe, *American Constitutional Law* Section 9-4 (1978) (just compensation limits government's power to isolate particular individuals for sacrifice to the public good). The rationale of the Fifth Amendment applies the same to people who are forced to bear a public burden by having $20,000.00 worth of land taken as it does to people who have $20,000.00 worth of personal property or services taken. The effect on the individual is the same. So the result should be the same. Just compensation must be

paid. *See Pennell v. San Jose*, 485 U.S. 1, 21 (1988) (Scalia, J. and J. O'Connor dissenting) (taxes, not regulatory takings, should be used to pay for general social ills such as when indigents are unable to pay for necessities).

Decisive action is needed by this Court to compel the State of Kansas to honor the Fifth Amendment and to avoid the profound adverse impact the Kansas Supreme Court decision would create. This case extends far beyond the yearly $2 million taking of money and services from a few hundred country lawyers. This case will determine the Fifth Amendment protection afforded, if any, to all personal property owners and service providers, which comprise a much larger segment of our society than real property owners. Allowing the Kansas Supreme Court decision to stand would entice the political majority embodied in the "State" to exploit any political minority by taking their non-real property and keeping the spoils. The Fifth Amendment protection would be severely undermined, if not gutted, since the State could then do indirectly – by freely taking non-real property to pay for the taking of real property – what it could not do directly. Accordingly, the Kansas Supreme Court decision should be reversed to prevent States from profiting by violating the Constitution and to avoid rendering the Taking/Just Compensation Clause protection of private property from State usurpation meaningless.

Taking without just compensation is fundamentally wrong and offensive to a free society. Individuals cannot do it. Corporations cannot. The all-powerful State cannot. *See McKesson Corp. v. Florida Alcohol and Tobacco Division*, No. 88-192 (U.S.S.Ct. June 4, 1990) (WESTLAW). That

fundamental concept embodied in the Fifth Amendment over 200 years ago should not be diminished now.

The lack of legal authority or practical reasoning to support the Kansas Supreme Court's decision, the contrary language and intent of the Fifth Amendment and *First Lutheran Church*, and the magnitude of the harm that would result dictate that the erroneous Kansas Supreme Court's decision should be reversed, perhaps summarily, without reaching the more difficult and complex issues raised herein.[2]

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[2] No doubt this lack of legal support is the reason why the Kansas Supreme Court attempted to evade this Court's review by relying on a hyper-technical procedural argument that the inverse condemnation theory had not been adequately raised in the trial court. But this Court's jurisdiction is not restricted when a state court procedural rule is interpreted as an "obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. v. Johnson*, 236 U.S. 120, 129 (1945).

The Kansas Supreme Court's reference to state procedural grounds does not have fair and substantial support as an adequate and independent state ground. Under the Kansas "notice pleading" rules, which were modelled after the federal rules of civil procedure, the words "inverse condemnation" do not have to be used in the Petition. A general allegation is sufficient. But Plaintiffs did both in their Petition. Paragraphs 13-16 of the Petition specifically alleged that under the Fifth Amendment Taking/Just Compensation Clause the State took Plaintiff's property without conducting a formal condemnation hearing, and Paragraph 23 specifically referenced the "inverse condemnation" action. *See* Appendix 4. This Court has long held that a "federal right cannot be defeated by the forms of local practice", such as the "over-exacting local requirements for meticulous pleadings." *Brown v. Western Railway*, 338 U.S. 294, 297-299 (1949).

(Continued on following page)

II. THE KANSAS SUPREME COURT'S ERRONEOUS DECISION UNDER THE EQUAL PROTECTION CLAUSE AND THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAUSES SANCTIONS THE STATE'S DISCRIMINATORY TAKING OF PROPERTY AND LIBERTY FROM A SMALL PORTION OF ITS CITIZENS IN AN UNREASONABLE AND ARBITRARY FASHION, WITHOUT ANY NOTICE OR AN OPPORTUNITY TO BE HEARD, WHICH IS CONTRARY TO THIS COURT'S PRIOR DECISIONS AND PROVIDES NO REMEDY FOR THE PAST VIOLATIONS OF INDIVIDUAL FREEDOMS GUARANTEED BY THE CONSTITUTION.

Plaintiffs alleged that they had a liberty and property right in their legal services which was unreasonably and arbitrarily taken without notice or a hearing in violation of substantive and procedural due process. Plaintiffs also alleged that their equal protection rights were violated because lawyers were treated differently than other professionals and businessmen and because country lawyers were treated differently than city lawyers, all without a reasonable basis. On the State's Motion for Judgment on the Pleadings, this must be accepted as true.

The *Smith* court found that the Equal Protection Clause was violated, perhaps substantive due process was violated by application of the Act, and did not

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Not only was the issue raised in the trial court, but it was fully briefed and argued by both sides on appeal, and decided by the Kansas Supreme Court. "Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised." *First Lutheran Church*, 482 U.S. at 313 n.8.

and Sharon H. Hainley, for appellant.

H. BROWN, J. For the reasons which follow, we affirm appellant's conviction, but vacate the sentence of death and remand for imposition of a life sentence in accord with State v. Penix (1987), 32 Ohio St. 3d 369, 513 N.E. 2d 744.

I

Admission of Victim Impact Evidence

In his second proposition of law, appellant challenges the use of victim impact evidence at the penalty phase of his trial.

In the instant case, appellant requested a presentence investigation report pursuant to R.C. 2929.03(D)(1). The report contained a summary of an interview with the victim's parents, Ralph, Sr., and Elizabeth Harris, in which Mr. Harris expressed the view that appellant should be sentenced to death.

This report was admitted into evidence. The prosecution also called Mr. and Mrs. Harris as rebuttal witnesses.

Mrs. Harris testified concerning the victim's good character. When asked if she was proud of her son, she replied, "Oh, God, how proud I was, a child that never give me no problem, no nothing, no drinking, no smoking, nothing but go to church and come back, ***." She described the effect on the victim's son[1]: "I hate to take him to the graveyard. He always wants to go. He think[s] he [is] going to see his dad." Mr. Harris testified, in response to a question from the prosecutor, that he believed appellant should get the death penalty.

In Booth v. Maryland (1987), 482 U.S. 496, decided after the trial of the instant case but before the court of appeals issued its opinion, the United

States Supreme Court held that the introduction of victim impact evidence in the penalty phase of a capital trial is constitutionally impermissible. Victim impact evidence is defined in Booth as including evidence which describes the personal characteristics of the victim, the emotional trauma suffered by the victim's family, or the family members' opinions and characterizations of the defendant and the crime. Id. at 502. The court reasoned that "[t]he prospect of a 'mini-trial' on the victim's character *** could well distract the sentencing jury from its constitutionally required task - determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime. ***" (Emphasis added.) Id. at 507. The holding of Booth was reaffirmed in

South Carolina v. Gathers (1989), 490 U.S. ____, 104 L. Ed. 2d 876, 109 S.Ct. 2207.

In State v. Post (1987), 32 Ohio St. 3d 380, 383, 513 N.E. 2d 754, 758, we noted that the admission of victim impact evidence at capital trials was not expressly permitted by the Ohio statutes. However, in Post and two subsequent cases, State v. Sowell (1988), 39 Ohio St. 3d 322, 530 N.E. 2d 1294, and State v. Brewer (1990), 48 Ohio St. 3d 50, 549 N.E. 2d 491, we found the admission of such evidence harmless in bench trials where there was no indication that the three-judge panel relied on the victim impact evidence in arriving at its sentence. See, e.g., Post, supra, at 384, 513 N.E. 2d at 759.

Four arguments have been advanced by the state to distinguish the present case

from Booth and Gathers. These are: (1) Ohio's use of a sentencing system where the jury's recommendation of a death penalty is not binding on the trial judge, (2) distinctions between the victim impact evidence in the instant case and that presented in Booth, (3) the victim impact evidence in this case was presented to rebut appellant's mitigation evidence, and (4) Booth and Gathers allow for victim impact evidence where the killer is acquainted with the victim.

A

Jury Recommendation

The prosecution argues that Booth v. Maryland, supra, is distinguishable from the instant case because an Ohio jury's recommendation of death is not binding on the trial judge, while a Maryland jury makes the final determination of sentence. Compare Md. Ann. Code (1987),

Article 27, Section 413(K)(1), with R.C. 2929.03(D)(3). We are urged to extend Post to jury trials and require the defendant to show that the sentencing judge was influenced by victim impact evidence before the sentence may be reversed.

We find this argument unpersuasive for two reasons. First, the Booth court held that the admission of the victim impact evidence in the sentencing phase of a capital jury trial is constitutional error. Second, in Gathers, supra, the Booth rule was applied to a case decided under South Carolina's capital punishment statutes, which use a "recommendation" system similar to Ohio's. See S.C. Code Ann. (1985), Section 16-3-20(C).

B

Distinctions Based on Quality of the Evidence

The court below found the admission of the victim impact statement to be harmless error because it was much shorter than that at issue in Booth, and because it contained statements blaming Elba Ortiz for "deceiving" the victim, which the court viewed as "favorable" to appellant. We do not agree.

It is true that the written victim impact statement at issue in Booth was longer and more detailed than that involved in the instant case, see Booth at 509-515, but Booth prohibits consideration of victim impact evidence. In Gathers, supra, the court, without reference to any presentence investigation reports or statements by surviving family members, held that it was constitutional error for the prosecutor, in his closing argument, to draw inferences about the victim's good

42 U.S.C. § 1983

The first issue is whether relief is available to plaintiffs under 42 U.S.C. § 1983. It provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

We have held that the State of Kansas has not waived its sovereign immunity in suits seeking monetary damages under 42 U.S.C. § 1983. See *Beck v. Kansas Adult Authority*, 241 Kan. 13, 21, 735 P.2d 222 (1987). More importantly, however, the United States Supreme Court has recently decided, subsequent to the filing of this case, that a State is not a "person" within the meaning of § 1983, and thus not subject to suit under the statue. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). Under *Will*, no relief is available to the plaintiffs under 42 U.S.C. § 1983.

42 U.S.C. § 1985(3)

The second issue is whether relief is available to plaintiffs under 42 U.S.C. § 1985(3), which provides in part:

> "If two or more persons . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws, . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of

> such conspiracy, whereby another is injured in his person or property, . . . the party so injured . . . may have an action for the recovery of damages occasioned by such injury or deprivation . . . . "

Although we have not directly addressed the question of whether damages may be recovered from the State under 42 U.S.C. § 1983(3), the logic of both *Beck* and *Will* dictates that they may not. Several jurisdictions addressing the question have held that the State is not a "person" under that statute. See, *e.g.*, *Coffin v. South Carolina Dept. of Social Services*, 562 F. Supp. 579, 585 (D.S.C. 1983). *Will* confirms those decisions. We hold that relief is not available under this section.

42 U.S.C. § 1994 AND THE THIRTEENTH AMENDMENT

The third issue is whether damages may be recovered by the plaintiffs under 42 U.S.C. § 1994, which provides:

> "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws. . . . regulations, or usages of any Territory or State, which have heretofore established. . . . or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

The purpose of 42 U.S.C. § 1994 is to enforce the Thirteenth Amendment. *United States v. Reynolds*, 235 U.S. 133, 59 L. Ed. 162, 35 S. Ct. 86 (1914). Section 1 of the Amendment provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

We discussed the Thirteenth Amendment issue in *Smith*, 242 Kan. at 378, and held that the appointment system for which the plaintiffs now claim damages does not violate the Thirteenth Amendment. Plaintiffs argue that we erred in our holding on this issue and that our analysis is outdated. They protest our reliance upon Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. Rev. 735, 768, 770 (1980), which they argue presents a narrow interpretation of the Thirteenth Amendment following *United States v. Shackney*, 333 F.2d 475, 485-87 (2d Cir. 1964). *Shackney's* interpretation was rejected by the Ninth Circuit in *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984). *Mussry* was a criminal case in which the indictment and bill of particulars charged "that the defendants unlawfully held poor, non-English speaking Indonesian servants against their will by enticing them to travel to the United States, paying them little money for their services, and withholding their passports and return airline tickets, while requiring them to work off, as servants, the debts resulting from the costs of their transportation." 726 F.2d at 1450.

Plaintiffs also rely upon *United States v. Kozminski*, 487 U.S. ___, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988). *Kozminski* is a criminal case involving different federal statutes. *Kozminski* involved an appeal by a farm family which was convicted of holding two mentally retarded men in involuntary servitude. The Court rejected the broad definition of involuntary servitude advocated by

the prosecution and found a narrow interpretation was appropriate under the circumstances of the case.

Neither *Mussry* nor *Kozminski* convinces us that we erred in *Smith*. The *Kozminski* court noted that "the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties," and that "the Thirteenth Amendment was not intended to apply to 'exceptional' cases well established in the common law at the time of the Thirteenth Amendment." 101 L. Ed. 2d at 805. In *Board of Osage County Comm'rs v. Burns*, 242 Kan. 544, 546-48, 747 P.2d 1338 (1988), we discussed the history of appointed counsel in Kansas. Attorneys were required to serve without compensation as counsel for indigent defendants accused of felonies from statehood until 1941. The power of the courts to require service of attorneys when necessary to meet the ends of justice is well established at common law. Generally speaking, indigents charged with felony offenses cannot legally be tried unless provided with counsel. Courts have a duty to see that criminal cases are legally and properly tried. Courts must therefore have the power to appoint counsel. See *Powell v. Alabama*, 287 U.S. 45, 73, 77 L. Ed. 158, 53 S. Ct. 55 (1932); *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940); *Clark v. Ivy*, 240 Kan. 195, 727 P.2d 493 (1986). We adhere to our decision in *Smith* and hold that relief is not available to plaintiffs under 42 U.S.C. § 1994 or the Thirteenth Amendment.

INVERSE CONDEMNATION

The fourth issue is whether plaintiffs may recover under the theory of inverse condemnation. While the other claims were spelled out in the petition filed in this case, we find no mention of inverse condemnation. Additionally, this theory was not presented to the trial court. A legal theory may not be asserted for the first time on appeal. *Landrum v. Taylor*, 217 Kan. 113, 120, 535 P.2d 406 (1975).

Even were we to consider this theory, we find no case in which we have applied inverse condemnation to the taking of services. Condemnation and inverse condemnation ordinarily involve a taking of real property without the owner's consent. *Lone Star Industries, Inc. v. Secretary, Kansas Dept. of Transp.*, 234 Kan. 121, 124, 671 P.2d 511 (1983). It appears to be an inappropriate vehicle, in light of all of the usual and existing theories upon which recovery may be based, and we decline to extend it to the claims asserted here.

UNJUST ENRICHMENT

The fifth issue is whether plaintiffs have a claim under the theory of unjust enrichment. A claim for unjust enrichment is in substance an action in implied contract, and under K.S.A. 46-903 and K.S.A. 46-907, such a claim may not be maintained against the State unless plaintiffs have previously filed a claim on which payment has been denied. *Wheat v. Finney*, 230 Kan. 217, 630 P.2d 1160 (1981). Plaintiffs contend that they have met this rule by having filed: (1) a case in federal court; (2) this case in state court; and (3) a claim with the Joint Committee on

Special Claims Against the State a month or more after this action was commenced. These filings do not meet the required *precedent* attempts at administrative resolution. The issue is thus without merit.

BIVENS ACTION

The sixth and final issue is whether plaintiffs have stated a claim under the theory of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388. *Bivens* is an unusual action in which the United States Supreme Court held that the plaintiff had stated a federal damage claim directly under the Fourth Amendment, although no federal statute authorized his action. Federal courts have not allowed *Bivens* actions against the states. See *Vakas v. Rodriquez*, 728 F.2d 1293 (10th Cir.), *cert. denied* 469 U.S. 981 (1984); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983); and *Phelps v. Wichita Eagle-Beacon*, 632 F. Supp. 1164 (D. Kan. 1986). The United States Supreme Court has limited nonstatutory damage actions brought under the *Bivens* theory and cautions against judicial action in expanding available remedies absent statutory mandate. See *Bush v. Lucas*, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983); *Chappell v. Wallace*, 462 U.S 296, 76 L. Ed. 2d 586, 103 S. Ct. 1362 (1983); *Vakas*, 728 F.2d at 1296. Plaintiffs seek to distinguish these cases on various grounds, but the arguments are not persuasive. We see no reason to recognize such an action against the State in this case.

In *Smith*, we found that the inequities under the old system of appointment and limited remuneration had reached such a point as to offend constitutional rights.

We directed that the system be changed within a very short period of time, and the change has occurred. We have found no case, and none has been cited, which mandates the award of monetary damages in such a case in addition to equitable relief. We conclude that the district court did not err when it granted summary judgment.

The judgment is affirmed.

SIX, J., not participating.

SEAL

DISTRICT COURT
TWENTY-SIXTH JUDICIAL DISTRICT OF KANSAS

Keaton G. Duckworth,
Judge
P.O. Box 280
Elkhart, KS 67950
316-697-2482

Kim D. Ramey, Judge
415 N. Washington
Liberal, KS 67901
316-624-0211

September 14, 1988

Rex A. Sharp
NEUBAUER, SHARP, McQUEEN,
DREILING & MORAIN, P.A.
P.O. Box 2619
Liberal, Kansas 67905

John W. Campbell, #10349
ASSISTANT ATTORNEY GENERAL
Kansas Judicial Center, 2d Floor
Topeka, Kansas 66612

Re: Rex A. Sharp, et al. vs. The State of Kansas
Case #88-C-33

Gentlemen:

The motion for summary judgment is granted.

The plaintiff's brought this action for damages arising out of an alleged failure by the state to pay them for court appointed attorney services. The plaintiffs stress several theories which they believe entitle them to recover. The real issue here is whether or not the plaintiffs have stated a cause of action upon which relief may be granted. I think not.

Damages alone do not create a cause of action. A party must present a recognizable cause of action to support their claim. The Kansas Supreme Court has ruled

in the case of State, ex rel. Stephan vs. Smith, 242 Kan. 336, that the former method of compensation for appointed counsel violated the equal protection clauses of the U.S. and Kansas constitutions. The court required the state to comply with existing statutes and regulations until July 1, 1988, and then adopt " . . . different bases for computing appointed counsel's compensation, the budgeting and funding of the same, and the possible extension of public defender systems or the adoption of contracts to provide counsel for indigents in some areas, or an intermixture of those and possibly other solutions . . . ". The court recognized that such action " . . . takes time", and simply stated that indigent defendants must have counsel, "and that is a burden which the bar must continue to shoulder, at least temporarily, under the present system".

It is clear to me that the Kansas Supreme Court decidedly settled the issue presented here by the plaintiffs.

Accordingly, I am [sic] directed summary judgment for the defense. Mr. Campbell is to prepare a Journal Entry for Mr. Sharp's review and approval.

Sincerely,

/s/ Kim D. Ramey
Kim D. Ramey
DISTRICT JUDGE

KDR/vv

IN THE SUPREME COURT OF
THE STATE OF KANSAS

Rex A. Sharp, et al., Appellants	)	
	)	
v.	)	No. 88-63066-AS
State of Kansas, Appellee	)	
	)	

You are hereby notified of the following action taken in the above entitled case:

Motion for rehearing.

This motion for rehearing is denied.

Yours very truly,
LEWIS C. CARTER
Clerk, Supreme Court

Date March 14, 1990

IN THE DISTRICT COURT OF
SEWARD COUNTY, KANSAS

REX A. SHARP, KERRY McQUEEN, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,	)	Case No. ___
Plaintiffs,	)	
vs.	)	
THE STATE OF KANSAS,	)	
Defendant.	)	

CLASS ACTION PETITION

Plaintiffs, for themselves and all other members of the class hereinafter described, allege that the State of Kansas wrongfully took property without just compensation or due process of law and have perpetrated other illegalities and would show the Court as follows:

Venue and Service of Process

1. Venue is proper in this Court under K.S.A. 60-614.

2. The named Plaintiffs are all residents of the City of Liberal, Seward County, Kansas, and have been damaged in Seward County, Kansas.

3. The State of Kansas can be served by serving the Kansas Attorney General, pursuant to K.S.A. 60-304(d)(5), or the Secretary of State pursuant to K.S.A. 75-418.

Class Allegations

4. This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of K.S.A. 60-223, for actual damages for a taking, or partial taking, of property or a liberty interest without just compensation, and for consequential damages, prejudgment interest at the maximum allowable rate, and attorneys' fees and costs.

5. The class represented by Plaintiffs in this action, of which Plaintiffs are themselves members, consists of all lawyers required by the State of Kansas to represent criminal indigent defendants in Kansas pursuant to the Indigent Defense Services Act or its statutory predecessor ("Act") or the rules and regulations under the Act.

6. The exact number of members of the class, as identified above, is not known, but is estimated to be more than one thousand members. The class is so numerous that joinder of individual members is impracticable.

7. There are common questions of law and fact in the action that relate to and effect the rights of each member of the class and the relief sought is common to the entire class, namely, the common questions of law being whether there was, and/or is, an unconstitutional taking of property from Plaintiffs, whether the taking was

done according to due process of law, what would constitute "just compensation" for the property taken from Plaintiffs, whether the Act, rules, and regulations were in violation of the Equal Protection Clause and, if so, what remedy Plaintiffs have for a violation of their constitutional rights.

8. The claims of Plaintiffs are representatives of the class in this action and are typical of the claims of the class in that the claims of all members of the class, including Plaintiffs, depend on a showing of the acts and omissions of Defendants giving rise to the right of Plaintiffs to the relief sought. There is no conflict as between any individual named Plaintiff and other members of the class with respect to this action, or with respect to the claims for relief.

9. The named Plaintiffs are the representative parties for the class, and are able to, and will, fairly and adequately protect the interest of the class. The attorneys for Plaintiffs are experienced and capable in trial and appellate practice. Of the attorneys designed as counsel for Plaintiffs, Rex A. Sharp, Gene H. Sharp, Kerry E. McQueen, and James H. Morain, will actively conduct and be responsible for Plaintiffs' case.

10. This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant.

11. This action is also properly maintainable as a class action in that the prosecution of separate action by

individual members of the class would create a risk of adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudication, or would substantially impair or impede their ability to protect their interest.

12. This action is also properly maintained as a class action as the questions of law and fact common to the members of the class predominate over any questions effecting only individual members, and a class action is superior to other methods for a fair and efficient adjudication of the controversy.

COUNT I & II: DUE PROCESS AND JUST COMPENSATION/TAKING VIOLATIONS

13. Defendant, under the Act, rules, and regulations, has been engaged for many years, in a continuing course of conduct to deprive, or partially deprive, Plaintiffs of their property or liberty interests to be used as a public good.

14. Defendant never brought formal condemnation proceedings as required by due process of law under the Fifth and Fourteenth Amendment to the U.S. Constitution before taking, or partially taking, Plaintiffs' property or liberty.

15. By state law, Plaintiffs have a protected liberty interest in their services. Plaintiffs have been and are the sole owner and beneficiaries of their legal services and other property with the full rights to own, sell, and derive benefits from the same.

16. Although Defendant has compensated Plaintiffs for some of what Defendant took, Defendant has never offered or made full compensation to Plaintiffs for the taking over the years.

COUNT III: EQUAL PROTECTION VIOLATION

17. Defendant, under the Act, rules, and regulations, has been engaged in conduct violative of the U.S. Constitutional Equal Protection Clause because Defendant imposed a financial burden (1) on some, but not all, attorneys; (2) some attorneys that it did not impose on any other group of citizens; and (3) some, but not other, attorneys depending on their geographic location.

COUNT IV: VIOLATION OF STATE CONSTITUTION

18. Defendant violated Art. 2, §17 of the Kansas Constitution because the Act did not operate uniformly because attorneys were treated differently depending on where they chose to practice.

COUNT V: UNJUST ENRICHMENT

19. Defendant accepted and used Plaintiffs' time, money, and services but has not paid full value for same and have thereby been unjustly enriched.

COUNT VI: THIRTEENTH AMENDMENT VIOLATION

20. Defendant has unconstitutionally appointed Plaintiffs to represent indigent criminal defendants in

violation of the Thirteenth Amendment to the U.S. Constitution which prohibits involuntary servitude.

COUNT VII: 42 U.S.C. §1983

21. Defendant (and its agents, employees, and lawyers) has directly and personally participated in the above described conduct to deprive Plaintiffs of their constitutional rights. In doing so, Defendant acted under color of State law.

COUNT VIII: 42 U.S.C. §1985(3)

22. Defendant (and its agents, employees, and lawyers) has directly and personally participated in a conspiracy for the purpose of depriving, either directly or indirectly, Plaintiffs of their equal protection rights and other federal and state rights as described above. Defendant by its conduct has and is causing injury to Plaintiffs' property and depriving them of liberty. A class based, invidiously discriminatory animus was behind the conspirators' actions. The conspirators discriminated against a readily recognizable class, specifically Plaintiffs.

COUNT IX: ATTORNEY FEES

23. Plaintiffs' counsel are entitled to attorney fees under 42 U.S.C. §1988; the common fund/common benefit doctrine; and/or the Constitutional or common law doctrine that in an inverse condemnation proceeding that Plaintiffs are entitled to be made whole such that their attorneys fees, expert witness fees, and other costs of

obtaining the fair market value of what has been taken from them should be paid for by Defendants.

COUNT X: 42 U.S.C. §1994

24. Defendant through acts, laws, resolutions, orders, regulations, or other usages of the State of Kansas have established, maintained, and enforced, directly or indirectly, the voluntary or involuntary service of Plaintiffs in liquidation of the supposed obligation Plaintiffs have to represent indigent criminal defendants. Defendant has maintained Plaintiffs in involuntary service by coercion of State law.

Exhaustion of State Administrative Remedies

25. In the unlikely event that the causes of action stated herein are construed to require notice under the Kansas Tort Claims Act or K.S.A. 4-901, et seq., such notice has already been given by filing a Complaint in Federal District Court in Wichita. *Sharp, et al. v. Kansas*, No. 88-1001-K. (U.S. District Court for District of Kansas, filed Jan. 4, 1988, now dismissed as to action against the State of Kansas for past damages).

WHEREFORE, Plaintiffs pray, for themselves and all other members of the class that:

1. The rights of the class members to maintain and recover under this suit be adjudicated and declared;

2. Plaintiff class be awarded actual damages, consequential damages, pre-judgment interest, and post-judgment interest far in excess of $1,000,000.00;

3. Plaintiffs by [sic] awarded attorney's fees and costs for prosecuting this suit;

4. Plaintiffs have such other relief as the Court may deem appropriate.

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By /s/ Rex. A. Sharp
Rex A. Sharp
Counsel for Plaintiffs